TAN WAY BOON & ORS.

v.

OMAR MARICAN HOLDINGS SDN. BHD. & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 23-208-88]
25 MAY 1990

CONTRACT: *Deed of assignment - Assignment of debts due - Validity - Whether absolute on conditional - Equitable assignment - Priority.*

The plaintiffs T, as judgment creditors, sued the judgment debtors JD for breach of a written agreement made between the 1st and 2nd named JD and which was guaranteed by the remaining debtors. Judgment was obtained and T successfully applied under O. 49 r. 1 of Rules of the High Court 1980 (RHC) for a garnishment order nisi against the garnishee G. In the meantime KGN as an interested party applied to intervene under O. 49 r. 6 of RHC 1980. Notwithstanding, a garnishment order absolute was entered against G. KGN now appeals against the granting of the garnishment order absolute.

The issue for determination was firstly the validity of a deed of assignment entered into between KGN and the 2nd named JD whereby as security for a loan, the latter purported to assign all payments and debts due from G to KGN and secondly whether KGN had priority over T in relation to monies due from G.

Held:

[1] On a proper reading of the deed of assignment, this was an absolute assignment because the 2nd JD assigned to KGN all monies due and payable to him by G under the said contract until his loan of RM300,000 is fully repaid.

[2] The "letter of consent" signed by 2nd JD and given to the Yang Di Pertua of G was a valid equitable assignment by the said debtor in favour of KGN.

[3] A garnishee order can only attach debts which the debtor himself is free to deal with at the time the garnishee order nisi is served; the debtor himself is bound by an equitable assignment which is independent of the giving of notice. The garnisher cannot attach a debt which had been equitably assigned and the equitable assignee therefore has priority over the person serving the garnishee order.

[Garnishment order rescinded. All moneys held thereunder to be paid to KGN under the deed of assignment.]

Cases referred to:

Yeo Chiang Swee v. United Decorators [1933] MLJ 85 and Holt v. Heatherfield Trust Ltd.
G. & T. Bridgewater Ltd. [1942] 1 All ER 404
United Overseas Bank Ltd. v. Singapore Engineers Ltd. [1966] 2 MLJ 267
Malayawata Steel Bhd. v. Government of Malaysia & Anor. [1975] 1 MLJ 22
Tancard v. Delagoa Bay and East Africa Railway [1889] 23 QBD 239

Legislation referred to:

Rules of the High Court 1980, O. 49 rr. 1, 6

For the interested party (Kewangan KGN Bhd.) - Raziah bt. Fakir Mohamed; M/s. Raziah & Partners

For the respondent/judgment creditor - Ajmer Singh Sandhu; M/s. Ajmer Singh Sandhu & Co.

[Editor's Note:
The judgment debtors are appealing the above decision.]

JUDGMENT

Mohamed Dzaiddin J:

In this appeal Kewangan KGN Berhad, the interested party under O. 49 r. 6 Rules of the High Court 1980 was dissatisfied with the decision of Penolong Kanan Pendaftar given on 7 September 1989 granting the judgment creditors a garnishee order absolute in respect of all monies due or accruing due from Majlis Perbandaran Pulau Pinang, the garnishee, to the judgment debtors to answer the judgment dated 27 July 1989 given against the judgment debtors.

The facts leading to this appeal are these. By a writ of summons and the statement of claim filed on 17 August 1988, the judgment creditors as plaintiffs sued the judgment debtors for breach of a written agreement dated 9 February 1988 made between the plaintiffs and the 1st and 2nd named judgment debtors, and which was guaranteed by the remaining debtors. The judgment creditors claimed for money owed in respect of services and works rendered and for goods sold and delivered to the 1st and 2nd named judgment debtors. On 27 July 1989, they obtained judgment against the debtors in the sum of RM347,590.80 with interests and costs. Then, by summons in chambers filed on 28 July 1989 the judgment creditors applied under O. 49 r. 1 Rules of the High Court 1980 for a garnishment order nisi against Majlis Perbandaran Pulau Pinang for money due from them to judgment debtors for a total sum of RM53,954.14. The said order nisi was accordingly granted by the Registrar on 31 July 1989. In the meantime, Kewangan KGN Bhd. ("KGN") applied to intervene in the said proceedings under O. 49 r. 6. This rule provides that if in garnishee proceedings it is brought to the notice of the Court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached, the Court may order that person to attend before the Court and state the nature of his claim with particulars thereof. However, after hearing the parties herein, the Registrar made a garnishment order absolute on 7 September 1989 ordering Majlis Perbandaran Pulau Pinang to forthwith pay to the judgment creditors the aforesaid sum of RM53,954.14.

In the supporting affidavit of Samsuddin bin Md. Jali (lampiran 44) affirmed on 2 September 1989, the deponent claimed that KGN was entitled to the money due from Majlis Perbandaran Pulau Pinang by virtue of a deed of assignment dated 27 August 1988 entered into between KGN and the 2nd named judgment debtor, ("the said debtor") where in consideration of a loan of RM300,000 granted by KGN to the said debtor, the latter assigned all payments and debts due from Majlis Perbandaran Pulau Pinang to them. KGN also relied on a letter dated 26 August 1988 written by the said debtor to Yang Di Pertua, Majlis Perbandaran Pulau Pinang purporting to give an irrevocable authority to Majlis Perbandaran Pulau Pinang to pay KGN all moneys due from Majlis Perbandaran Pulau Pinang to the said debtor under the Contract No. 146/87 dated 26 January 1988.

Before me, Cik Raziah for KGN, submitted that KGN had priority on the moneys due from Majlis Perbandaran Pulau Pinang over the judgment creditors because the assignment was absolute and was executed one year before the judgment creditors obtained judgment against the judgment debtors. Counsel relied on *Yeo Chiang Swee v. United Decorators* [1933] MLJ 85 and *Holt v. Heatherfield Trust Ltd. and G. & T. Bridgewater Ltd.* [1942] 1 All ER 404. Cik Raziah further submitted that the letter of 26 August 1988 authorizing Majlis Perbandaran Pulau Pinang to forward all payments or debts due to the judgment debtors direct to KGN constituted a valid equitable assignment which would also rank in priority to the garnishment order. She relied on the authority in *United Overseas Bank Ltd. v. Singapore Engineers Ltd.* [1966] 2 MLJ 267.

In response to Cik Raziah's argument, Encik Ajmer submitted that the assignment was not a valid assignment. It was a conditional assignment because under para. 2 of the contract No. 146/87 dated 26 January 1988 made between Majlis Perbandaran Pulau Pinang and the said debtor the payment for the consideration of the contract was conditional upon the contractor rendering to Majlis Perbandaran Pulau Pinang a true and proper account. Relying on the authority in *Malayawata Steel Bhd. v. Government of Malaysia & Anor*. [1975] 1 MLJ 22 Counsel submitted that the said assignment being conditional was therefore unenforceable. Counsel further submitted that the assignment was made to overcome any judgment which the judgment creditors would obtain against the judgment debtors because it was executed just a day after the judgment debtors were served with the writ of summons by the judgment creditors. In fact, on this point Cik Raziah informed me that it was just coincidental that the said assignment was executed on 27 August 1988.

Therefore, the only issue in this appeal revolves on the deed of assignment. If it is a valid assignment, it follows that the question of priority is decisive. Let me first examine the relevant terms of the deed of assignment dated 27 August 1988. This assignment was given by the said debtor to KGN as security for a loan of a sum of RM300,000 to enable him to carry out the contract works granted by Majlis Perbandaran Pulau Pinang to him under Contract No. 146/87 dated 26 January 1988. The said contract which involved the collection and disposal of refuse within Penang Island was for a period of two years commencing 1 February 1986 until 31 January 1990. Under the said contract the consideration was the payment of a sum of RM53,954.14 per month, which be it noted, shall only be paid after being certified by Pengarah Perkhidmatan Kesihatan of Majlis Perbandaran Pulau Pinang that it was due and payable. Thereupon, it shall be paid within a period of 14 days or within such extended period as may be determined by Majlis Perbandaran Pulau Pinang, of the rendering of true and proper account by the said debtor to Majlis Perbandaran Pulau Pinang. Clause 1 of the said assignment states that in consideration of KGN advancing from time to time the various sums to the said debtor not exceeding RM300,000, the said debtor assigned to KGN all moneys due and payable to him from Majlis Perbandaran Pulau Pinang with effect from 1 October 1988. Next, Clause 3 provides that the moneys received shall be deducted by KGN towards the repayment of the said loan of RM300,000. Thus, on a proper reading of the said assignment, it is my finding that this is an absolute assignment, it is my finding that this is an absolute assignment. Absolute in the sense that the said debtor assigns to KGN all moneys due and payable to him by Majlis Perbandaran Pulau Pinang under the said contract until his loan of RM300,000 is fully satisfied or repaid. It cannot be a conditional assignment as submitted by Encik Ajmer. The condition which Counsel referred to relates to the Contract No. 146/87 which concerns the manner how the payment of RM53,954.14 under second schedule of the said

agreement was to be paid. Insofar as the assignment is concerned, it is clear to me that there is no condition attached, except, a proviso that in the event of KGN receiving moneys in excess of the loan, KGN agreed to refund any such excess to the said debtor. In *Tancard v. Delagoa Bay and East Africa Railway* [1889] 23 QBD 239, a debt was assigned as security for a loan of money with the proviso that if the assignor repaid the loan, the debt should be reassigned to him. That was held to be an absolute assignment.

With respect, the facts in the present assignment are totally different from what the learned Judge in *Malayawata Steel Bhd. v. Government of Malaysia & Anor*. (*supra*) had found. There, on the facts, Mohamed Azmi J (as he then was), after analyzing the evidence found that the assignment was subject to certain conditions and was not intended to be absolute. He based his finding after gathering the arrangements contained in several letters exchanged between the appellants and the respondents. In the present case, the terms in the said assignment are clear and enforceable. For reasons stated above, in my judgment, the said assignment is a valid one.

Further, I am of opinion that the "letter of consent" dated 26 August 1988 signed by the said debtor and given to the Yang Di Pertua Majlis Perbandaran Pulau Pinang which was duly acknowledged, constitutes a valid equitable assignment by the said debtor in favour of KGN. The material part of this letter states as follows:

> Whereas I have assigned the benefit of the contract to Kewangan KGN Bhd. of No. 12-16 Church Street, 10200 Penang in consideration for a loan of Ringgit Malaysia Three Hundred Thousand only (RM300,000).
>
> Now I hereby give you an irrevocable authority to pay Kewangan KGN Bhd. all monies due to me under the contract and such payments will execute a valid discharge for all monies due to me under the said contract:

In *United Overseas Bank Ltd. v. Singapore Engineers Ltd.* (*supra*), Gim Guan Company wrote to the Chairman, Housing and Development Board as follows:

> We hereby authorise you to make all future payments direct to our banker, the United Chinese Bank Limited, Bonham Building, Singapore against bills submitted to you for projects undertaken by us for the board.

The issue raised before Winslow J was whether the above letter constituted a valid equitable assignment to the plaintiff bank. The learned Judge, after going through the authorities cited by Counsel held that the letter in question was a valid equitable assignment.

In *Yeo Chiang Swee* (*supra*), the head notes state that where a judgment debtor had before judgment assigned the benefit of a contract to another and the money payable under the contract was afterwards paid to the Sheriff under a notice of garnishment, the judgment creditor was not entitled to payment out to him of such moneys, the judgment debtor having parted with his interest therein prior to the date of garnishment notice. Terrall J delivering an oral judgment held that the plaintiffs were entitled to payment of the money as against the judgment creditor.

In *Holt's* case (*supra*), which was a case decided in the King's Bench Division by Atkinson J regarding an assignment within the meaning of the English Law of Property Act 1925, the editorial note stated that for the purpose of deciding the question of priority, was it the date on which the assignment became a legal assignment or was it sufficient that an equitable

assignment had been executed? The note stated that upon a review of the cases, the Judge has had regard to the fact that a garnishee order can only attach debts which the debtor himself is free to deal with at the time the garnishee order *nisi* is served. The debtor himself is bound by an equitable assignment which is independent of the giving of notice. The garnishor, therefore, cannot attach a debt which has been equitably assigned, or in other words, the equitable assignee has priority over the person serving the garnishee order.

Therefore, applying the principles of the above cases to the instant case, in my judgment, KGN being the equitable assignee has priority over the judgment creditor with respect to moneys due from Majlis Perbandaran Pulau Pinang, the subject matter of the garnishment order absolute.

Finally, regarding the suggestion of Encik Ajmer that the deed of assignment was not made *bona fide* and that it was executed to overcome the execution of judgment which the judgment creditors would subsequently enforce against the judgment debtors, I am satisfied, after giving due consideration that this allegation was unfounded. It is unthinkable for KGN to collude with the judgment debtors in executing a "bogus" deed of assignment, when on the facts it is clearly shown that KGN had assisted the 2nd named judgment debtor in providing a loan of RM300,000 for him to implement his contract with Majlis Perbandaran Pulau Pinang. At any rate, it must be remembered that it requires a higher burden of proof on the judgment creditors to show *mala fide*.

In the result and for the reasons stated above, I allow this appeal with costs. The garnishment order absolute is hereby rescinded and all moneys held thereunder shall now be paid to KGN under the deed of assignment.

Also found at [1990] 2 CLJ 700